STATE OF MICHIGAN

COURT OF APPEALS

LECESTER L. ALLEN and MATTIE ALLEN,

Plaintiffs-Appellants,

v

GLENN R. PLUMMER, KARIN A. PLUMMER, and TV-48 DETROIT, INC.,

Defendants-Appellees,

and

JAMES L. ELSMAN, BLACKSTAR COMMUNICATIONS OF MICHIGAN, INC., and BLACKSTAR OF ANN ARBOR, INC.,

Defendants.

UNPUBLISHED
April 19, 2002

No. 224500
Oakland Circuit Court
LC No. 96-523238-CK

Before: Saad, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiffs, Lecester L. Allen and Mattie Allen, appeal by leave granted the trial court's order of judgment in favor of defendants, Glenn R. Plummer, Karin A. Plummer and TV-48 Detroit, Inc. (TV-48), entered on November 30, 1999. We reverse and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

The Allens filed a complaint for declaratory judgment and requested the trial court to declare that they retained their shareholder status in TV-48, a closely held corporation, and did not become mere creditors of the corporation after exercising a put option under a corporate shareholder agreement. The Plummers, who were officers and owners of 51% of the shares in the company, ran the day-to-day operations of TV-48 and Karin Plummer acted as the company bookkeeper. The Allens were also officers of TV-48 and owned 49% of the shares.

The parties executed a shareholder agreement and addendum on May 30, 1991, which set forth the terms and conditions for the Allens to compel the Plummers to buy back their shares. TV-48 started broadcasting as a low-power UHF station in June 1991. Over several months, the

Allens loaned a total of approximately $39,000 to pay various expenses at the station, but no promissory notes were executed to reflect the loans. After the station began broadcasting, Glen Plummer and Lecester Allen began to have numerous disagreements about the management and operations of TV-48. According to Allen, he did not receive monthly financial statements as required by law and Plummer refused to hire a professional bookkeeper or accountant. Allen also became concerned that the Plummers were using certain equipment and income from TV-48 to support their other company, CTN Productions, which operated in the same building as TV-48.[1]

Over several months, the parties' relationship continued to deteriorate and the Allens exercised their put option by way of their May 26, 1994 letter to the Plummers which provides, in part:

> The Allens are the owners of 4,900 shares of the capital stock of the Corporation. Under Article II, Section 4 of the Agreement, the Allens have the option to compel the Corporation and the Plummers to purchase the Allens' shares in the Corporation. This letter is to advise you that Allens have elected to exercise this option, and that you must purchase the Allens' shares in the Corporation in accordance with the Agreement.

Notwithstanding the letter, the parties did not proceed with the buy-out procedures set forth in the shareholder agreement. On January 18, 1996, the Plummers sold most of TV-48's assets to Blackstar Communications of Michigan, Inc., for $1 million, without the Allens' knowledge or consent. On February 14, 1996, more than a year and a half after the Allens sent their put election letter, Plummer appeared at Lecester Allen's office and handed him an envelope containing a check for $159,628.83. Along with the check, Plummer included a one-page document listing the monthly earnings of TV-48 for the twelve months preceding the date of the put election which, according to the Plummers, was the designated buy-out price under the shareholder agreement. The Allens never cashed the check and, after learning that the Plummers sold TV-48 to Blackstar, the Allens filed their complaint in this case.

In addition to requesting a declaratory judgment regarding their shareholder status, the Allens requested a declaratory judgment and equitable relief under MCL 600.3605 and MCL 450.1487 and alleged that the Plummers and their attorney, James L. Elsman, sold TV-48 to Blackstar for less than its true value and without proper corporate authorization. The Allens further alleged claims for breach of fiduciary duty, breach of contract, waste, misappropriation of corporate opportunities and unjust enrichment.

The Plummers filed a motion to bifurcate the Allens' claim regarding their shareholder status from the remaining allegations and the trial court granted the motion on September 4, 1996. Following an eight-day bench trial, the trial court issued a written opinion and order on November 30, 1999. The trial court ruled that, by validly exercising their put option on May 26, 1994, the Allens became mere creditors of TV-48 and did not retain their shareholder status after

[1] Allen also suspected that the Plummers used part of his $39,000 loan to finance CTN Productions and that, after other financing fell through, the Plummers used TV-48 corporate funds to purchase two other stations, TV-26 in Michigan and TV-61 in Louisiana.

that date. Accordingly, the Allens could not maintain their shareholder derivative claims against the Plummers and TV-48. Thereafter, the trial court denied the Allens' motion for reconsideration and ruled that the only remaining issue was a determination of the buy-out price under the shareholder agreement.

The Allens filed an application for leave to appeal the trial court's order and, on February 16, 2000, this Court granted leave, limited to the issues raised in the application.

II. Analysis

A. The Contentions of the Parties

The Allens argue that the trial court erred by entering judgment in favor of the Plummers because the Plummers failed to satisfy the buy-out terms and obligations in the shareholder agreement. As noted above, in its November 30, 1999 order, the trial court ruled that, because the put option letter was valid, the Allens became creditors of the corporation on May 26, 1994. The trial court made this ruling notwithstanding its own finding that "none of the formalities set forth in Article IV of the Shareholder Agreement . . . occurred" and that "there was no timely payment of the purchase price, no closing, no delivery or escrow of the Plaintiffs' shares, and no releases were executed." Further, in denying the Allens' motion for reconsideration, the trial court ruled "that the formalities of exercising the put option were met and that neither party pursued the formal requirements set forth in the Shareholder Agreement." Based on "the lack of legal authority in this state regarding the issue," the trial court found that its prior ruling did not constitute error.

The Allens urge this Court to rule that they remain shareholders of TV-48 because, under the plain terms of the shareholder agreement, though the exercise of the option may have been valid, none of the contractual obligations for the buy-back were met and their shares never passed to the Plummers. Conversely, the Plummers contend that, regardless of the specifications in the shareholder agreement, the Allens manifested their intent to relinquish their shareholder status by virtue of their May 26, 1994 letter. The Plummers maintain that the put option letter created a binding, bilateral contract, which obligated the Plummers to pay for the Allens' shares and that no further steps were necessary to render the Allens mere creditors of TV-48. The Plummers also assert that, if title to the shares did not pass until they paid for them pursuant to the closing procedures, the parties intended that "equitable title" to the shares would pass automatically upon the exercise of the put.

B. Standard of Review and Applicable Law

This Court "review[s] the trial court's findings of fact in a bench trial for clear error and conduct[s] a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). This appeal involves the terms and interpretation of the shareholder agreement and addendum, both of which are contracts. "The proper construction and interpretation of [a] contract is a question of law [this Court] review[s] de novo." *Bandit Industries, Inc v Hobbs Intern, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001), quoting *Perry v Sied*, 461 Mich 680, 681 n 1; 611 NW2d 516 (2000).

Neither party argues that the terms of the shareholder agreement are ambiguous. Accordingly, "[u]nder ordinary contract principles, . . . construction of the contract is a question of law for the court." *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). Further, "[w]here the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Amtower v William C Roney & Co*, 232 Mich App 226, 234; 590 NW2d 580 (1998), quoting *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991).

The proper resolution of this dispute depends on our interpretation of an option contract. Option contracts are strictly construed by the courts of our state. *Le Baron Homes v Pontiac Housing Fund*, 319 Mich 310, 313; 29 NW2d 704 (1947). As our Supreme Court explained in *Le Baron*, "'[a]n option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost.'" *Id.*, quoting *Bailey v Grover*, 237 Mich 548, 554; 213 NW 137 (1927). Further, "[a]n option may ripen into a binding bilateral contract of purchase and sale by a seasonable exercise of the option and compliance with its terms by the optionee." *Le Baron, supra* at 315. As with other contracts, courts consider an option agreement based on the parties' intent and the "nature and text of the entire written agreement . . . ." *Webb v ROA General, Inc*, 773 P2d 834, 837 (Utah App, 1989). In *Stephenson v Drever*, 947 P2d 1301, 1304; 16 Cal 4th 1167; 69 Cal Rptr 2d 764 (1997), the Supreme Court of California described a contract very similar to the one in this case:

> The contract in issue is of the type commonly known as a buy-sell agreement. A buy-sell agreement is a contract by which the stockholders of a closely held corporation . . . seek to maintain control over the ownership and management of their business by restricting the transfer of its shares. . . . Although the agreement often serves multiple purposes, its principal objective is to permit the original owners of the corporation to retain control over the identity of their business associates; a secondary purpose is to protect the investment of the departing (or the estate of the departed) shareholder by facilitating the valuation and sale of an interest that might otherwise have no ready market.
>
> Despite its specialized nature and purposes a buy-sell agreement remains a contract, and is therefore subject to the rules governing the validity, interpretation, and enforcement of contracts laid down by statute and case law. When we inquire what kind of contract a buy-sell agreement is, we see that in essence it is an executory contract to buy and sell personal property -- specifically, shares of corporate stock owned by an employee -- when a particular event occurs . . . . [Citations omitted.]

C. Application of the Law

We hold that the Allens did not lose their shareholder status immediately upon their exercise of the put option. The plain language of the shareholder agreement specifies that ownership of the shares will transfer at a formal closing held within nine months of the exercise of the option, when the terms of the sale are fulfilled. The agreement does not evidence an intent to divest the Allens' legal or equitable ownership of the shares at the time they merely notify the

Plummers of their decision to exercise the option and, because the buy-out did not occur under the terms of the option agreement, the Allens remain shareholders of TV-48.

Under the shareholder agreement, Article II, Section 4, once the Allens validly exercise the put option, the buy-out procedures are governed by terms in the shareholder agreement. Article II, Section 4 further provides:

> In the event that Allen makes a proper election to exercise the option . . ., then no later than nine (9) months after delivery of the written election to exercise said option, Allen shall sell and Plummer shall purchase all, but not less than all of the Shares owned by Allen at the Purchase Price set forth in Article III hereof upon the terms set forth in Article IV hereof.

This subsection makes no reference to an immediate change in the Allens' shareholder status upon exercise of the option, and specifically contemplates a potential nine-month delay in consummating the sale.

The shareholder agreement further contemplates that the "Purchase Price of the Selling Shareholder's Shares shall be equal to the greater of the Book Value or the Agreed Value of said Selling Shareholder's Shares." The agreement specifies that the company's "regular accountant" shall determine the book value of the shares, in conjunction with a certified independent appraiser "chosen by mutual agreement between the Selling Shareholder and the Purchasers." Alternatively, the agreement provides that the company's "regular accountant," using "generally accepted accounting principles, consistently applied," shall determine the "agreed value" of the shares. Here, the "agreed value" is defined as 49% of "two (2) times the gross receipts of the Company for the one (1) year period ending on the last day of the month preceding the month in which the triggering event occurred." These alternative methods of valuing the stock for purchase not only suggests that the value must be determined at some time during the nine-month buy-out period, but that some agreement must be reached regarding the method of valuation, appraisal of the corporate assets or the accounting procedures used to determine the buy-out price.

The shareholder agreement also expressly provides that the transfer of the shares will occur at a formal closing, at which time the Allens must transfer their shares, simultaneous with the Plummers' payment of at least a portion of the purchase price. The agreement states that, at the closing, Plummer must pay ten percent of the purchase price by certified check and Allen must deliver his share certificates to Plummer, "duly endorsed in blank with the signature guaranteed and with the proper federal and state transfer tax stamps thereunto attached . . . ." Under the agreement, if the Plummers pay the entire purchase price at the closing, the shares then pass in full to them. If the Plummers pay only ten percent of the purchase price at the closing, the agreement requires the Plummers to execute a promissory note for the balance of the purchase price and that the parties must agree on an escrow agent to hold the shares as collateral for payment on the note. These detailed provisions express the parties' intent that the shares will transfer only after the Allens are adequately protected under the terms of the agreement and the Plummers' payment is guaranteed.

Additionally, the shareholder agreement addresses the voting rights accompanying the transfer of the Allens' shares. If the Plummers opt to pay for the shares over time, the agreement

provides that the shares will be held in escrow, but the voting rights pass to the Plummers at closing and remain theirs so long as they pay for the shares under the terms of the agreement. However, if the Plummers default in their payments, the Allens regain their voting rights until the Plummers pay for the shares in full.

Were we to find that legal or equitable title to the shares passed to the Plummers upon the Allens' mere exercise of the option, rather than at closing, the provisions regarding the transfer of the shares at closing and the exercise of voting rights would be superfluous. To the contrary, these provisions clearly express the parties' intent that the shares, and the accompanying shareholder rights, will not pass unless and until Plummer makes the payments as set forth in the agreement.

Indeed, not only does the shareholder agreement state that the transfer of the shares occurs at the closing, the agreement further provides that, at the closing, the selling and purchasing shareholders must execute mutual releases and the selling shareholder must tender his resignation as an officer or director of the company. Thus, the Plummers' assertion that the exercise of the option was sufficient to divest the Allens of their rights because it evidenced an intent to abandon the company is unavailing. Clearly, the shareholder agreement controls the rights of the parties; the agreement provides for a formal closing not only for the transfer of ownership of the stock, but for the Allens' formal departure from the corporation.

After the Allens sent the put election letter on May 26, 1994, the Plummers' attorney sent the Allens a letter stating that the Plummers were awaiting certain "CPA Financials" to determine the purchase price of the shares and that the Plummers would contact the Allens to attend a special shareholders meeting "to set the [p]rice." Notwithstanding this letter, the Plummers failed to discuss the purchase price with the Allens or hold a shareholders meeting and, as noted above, the parties also failed to hold a formal closing and never exchanged releases. Further, the Plummers did not pay for any part of the shares or execute a promissory note, and the Allens did not transfer the shares to the Plummers or resign as officers or board members of TV-48. Thus, while apparently acknowledging that the purchase price must be set and that formal arrangements must be made to determine and pay the purchase price, the Plummers failed to take any steps to effectuate the buy-out or to alter the Allens' status as shareholders or officers of the company.

Because none of the mandatory terms of the shareholder agreement were met, the option failed. While the Allens could have pursued certain remedial measures under the shareholder agreement after the Plummers defaulted by failing to buy their shares, such as forcing sale of the shares or the corporation,[2] these actions were permissive and, therefore, the Allens' failure to pursue them did not have the effect of restricting their rights as shareholders. Rather, the Allens remain shareholders of TV-48 because the time for purchase of the shares and for closing the sale simply lapsed. The Plummers' belated attempt to "reimburse" the Allens after the lucrative sale to Blackstar does not alter this conclusion. Under the clear terms of the shareholder agreement, no buy-out occurred, no delivery of the shares occurred, the option failed and no legal or equitable ownership of the Allens' shares passed to the Plummers.

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[2] These and other remedial alternatives appear in the shareholder agreement under Article VI, Sections 3 and 5.

The trial court's ruling that the Allens became mere creditors of the corporation immediately upon their exercise of the option contradicts the clear language of the agreement that the exercise of the option would trigger specific duties and obligations in order to effect a valid buy-out. While the Plummers ultimately issued a check to the Allens, almost a year after the closing should have occurred and after the Plummers sold most of the TV-48 assets to Blackstar, the Plummers did not comply with the terms of their agreement regarding the time for payment, the establishment of a purchase price or the exchange of the stock certificates, promissory notes, releases and resignations. As we said above, the courts of our state construe option agreements strictly and compliance with the terms of an option agreement are essential to their valid execution. Accordingly, here, we will not read the shareholder agreement in a manner contrary to the clearly articulated intent of the parties as expressed in the shareholder agreement.

Though not dispositive on the issue before us, we also note that, despite their position on appeal, evidence at trial established that Glen Plummer referred to the Allens as shareholders for several months after the Allens exercised their option. Despite the Plummers' acknowledgement of the Allens as shareholders, the Plummers did not notify the Allens about Blackstar's interest in buying TV-48. Further, the Plummers did not draft a corporate resolution naming themselves as sole shareholders until the day of the Blackstar closing and did so despite the fact that no closing occurred on the buy-out, the shares were not transferred, no payment was made, no releases were signed and neither Lecester or Mattie Allen resigned as officers or members of the board.

With these facts, we are persuaded by the California Supreme Court's observations in *Stephenson*, in which the Court addressed the status of a selling shareholder under a similar option contract:

> A shareholder without a shareholder's rights is at best an anomaly, and at worst a shadowy figure in corporate limbo who would be voiceless in the conduct of the business of which he is part owner and largely defenseless against neglect or overreaching by management. We will not interpret the contract to produce this result without a compelling reason to draw the inference proposed by defendants. Defendants fail to provide such a reason. [*Stephenson, supra* at 1307.]

Indeed, the Allens were forced into this "corporate limbo" by the Plummers' disregard of and failure to abide by the terms of the shareholder agreement and their simultaneous refusal to include the Allens in the fundamental corporate decision to sell most of the company's assets. The plain language of the agreement indicates an intent by the parties that legal and equitable ownership of the shares would not pass until the provisions of the agreement were satisfied. This did not occur, despite the Allens' attempt to exercise the option.

Accordingly, for the reasons discussed, the trial court erred as a matter of law in ruling that the Allens' were divested of their shareholder status upon the mere exercise of the put option. Therefore, we reverse the trial court's declaratory judgment in favor of the Plummers and remand for further proceedings.

We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski